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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES TURF CLUB,
INCORPORATED, a California
Corporation, *et al.*,

Plaintiffs,

VS.

HORSE RACING LABS, LLC, a Delaware Limited Liability Company (a/k/a IMMERSÉ, LLC), d/b/a DERBYWARS, and DOES 1 through 10, inclusive.

Defendants.

No. 2:15-cv-09332-SJO (JEMx)

Honorable S. James Otero
Courtroom No. 1

**DEFENDANT'S NOTICE OF MOTION
AND MOTION FOR JUDGMENT ON
THE PLEADINGS PURSUANT TO
FED. R. CIV. P. 12(c); MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Hearing Date: August 1, 2016
Hearing Time: 10:00 a.m.

Complaint Served: December 3, 2015
Am. Complaint Served: May 16, 2016

1 **TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on August 1, 2016 at 10:00 a.m., or as
 3 soon thereafter as this matter may be heard, in Courtroom No. 1 of the United
 4 States District Court for the Central District of California, located at 312 North
 5 Spring Street, Los Angeles, California 90012, Defendant Horse Racing Labs, LLC,
 6 doing business as Derby Wars (“Derby Wars”), by and through its undersigned
 7 attorneys, will and hereby does move under Rule 12(c) of the Federal Rules of Civil
 8 Procedure for judgment on the pleadings in its favor on Plaintiffs Los Angeles Turf
 9 Club, Inc., Los Angeles Turf Club II, Inc., Pacific Racing Association, Pacific
 10 Racing Association II, Gulfstream Park Racing Association, Inc., Oregon Racing
 11 Inc., Maryland Jockey Club of Baltimore City, Inc., and Laurel Racing Association,
 12 Inc.’s (collectively, “Plaintiffs”) First Amended Complaint (“FAC”).

13 The grounds for Derby Wars’s motion are that: Plaintiffs may not seek relief
 14 under the Interstate Horseracing Act, 15 U.S.C. § 3001, *et seq.* because that statute
 15 does not create a private right of action to recover proceeds from purportedly
 16 unlawful gambling. Further, this Court should decline to exercise supplemental
 17 jurisdiction over Plaintiffs’ claim under California Unfair Competition Law, Cal.
 18 Bus. & Prof. Code § 17200 (“UCL”). Additionally, Plaintiffs lack standing under
 19 the UCL. Finally, Plaintiffs may not seek nonrestitutive disgorgement under the
 20 UCL.

21 This motion is based on this notice of motion, the accompanying
 22 memorandum of points and authorities, the concurrently filed proposed order, all
 23 other pleadings and papers on file in this action, and such argument or evidence that
 24 the Court may consider at or before the hearing on this motion.

25 Pursuant to Local Rule 7-3, this motion is made following the in-person
 26 conference of counsel, which took place on June 20, 2016. During the conference,
 27 counsel for the parties thoroughly discussed the substance of the arguments set
 28 forth herein, as well as potential resolution of the disagreements, in an attempt to

1 eliminate the need for this motion. The parties were unable to reach an agreement,
2 necessitating this motion.

3
4 Dated: June 29, 2016

Respectfully submitted,

5 MANATT, PHELPS & PHILLIPS, LLP
6 Matthew P. Kanny
Arunabha Bhoumik
7 Maura K. Gierl

8 By: /s/ Matthew P. Kanny
Matthew P. Kanny
9 *Attorneys for Defendant*
HORSE RACING LABS, LLC

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1 **I. INTRODUCTION**

2 Defendant Horse Racing Labs, LLC (“Derby Wars”) operates a website
 3 which allows customers to participate in skill-based online horse racing fantasy
 4 contests. All of Derby Wars’s contests have a fixed entry fee, a fixed prize, and a
 5 maximum number of participant entries. Participants in these contests are awarded
 6 points based on how horses collectively perform over a series of different races. At
 7 the end of each contest, the participant with the most points wins the fixed prize.
 8 No prize is awarded based on the outcome of any single race. Derby Wars
 9 contends that its fantasy contests do not constitute “bets” or “wagers” under federal
 10 or state gambling laws, and are thus not illegal under these laws.

11 In their Amended Complaint,¹ Plaintiffs accuse Derby Wars of operating an
 12 illegal gambling business, and argue that they should be entitled to a cut of the
 13 purportedly unlawful proceeds. Plaintiffs assert claims under the Interstate
 14 Horseracing Act, 15 U.S.C. § 3001 *et seq.* (the “IHA”), and under the California
 15 UCL. Both of these claims are fatally flawed.

16 First, Plaintiffs cannot recover under the IHA because that statute does not
 17 provide a private right of action to recover proceeds derived from purportedly
 18 unlawful gambling. The express terms of the IHA, and its legislative history, are
 19 explicit that the statute only allows for recovery of the proceeds of otherwise lawful
 20 wagers. To be clear, Derby Wars maintains that its contests are lawful because they
 21 are not “wagering” at all under the IHA and/or the Unlawful Internet Gambling

22

23 ¹ The Court previously granted Derby Wars’s motion to dismiss Plaintiffs’ RICO,
 24 intentional interference with a prospective economic advantage, and unfair
 25 competition under California’s Unfair Competition Law, Cal. Bus. & Prof. Code §
 26 17200 (“UCL”) claims, as alleged in the original complaint. (Docket No. 30
 27 (“Order”).) In so ruling, the Court specifically noted that Plaintiffs’ alleged
 28 monetary losses were speculative because they failed to account for other reasons a
 consumer may choose to participate in Derby Wars’s fantasy contests, rather than
 wagering in person at a race track. (Order at 6.) The Court further noted that it is
 “even possible that fantasy sports betting expands the horse racing betting
 consumer base, by promoting interest in the sport” which “would benefit
 Plaintiffs.” (*Id.*)

1 Enforcement Act. *See* 31 U.S.C. § 5362. But because Plaintiffs allege that all of
 2 Derby Wars's fantasy contests constitute unlawful wagering, they cannot recover
 3 under the IHA. In short, Plaintiffs cannot have it both ways – they cannot allege
 4 that Derby Wars is engaging in illegal conduct (which is not regulated by the IHA),
 5 and then ask this Court for a cut of those purportedly unlawful proceeds.

6 Second, if this Court dismisses Plaintiffs' IHA claim, this Court should
 7 decline to exercise supplemental jurisdiction over Plaintiffs' state law UCL claim,
 8 since Plaintiffs assert only federal question jurisdiction, and because this case is
 9 still in its initial stages. Thus, retaining jurisdiction in this Court "would not
 10 meaningfully advance the values of economy, convenience, or fairness."

11 Third, should this Court elect to exercise supplemental jurisdiction over
 12 Plaintiffs' UCL claim, that claim fails because Plaintiffs do not (and cannot) allege
 13 that Derby Wars caused them to lose any actual money or property – a threshold
 14 requirement of the UCL. Rather, Plaintiffs merely speculate that participants in
 15 Derby Wars's fantasy contests would otherwise place wagers at their tracks. Such
 16 speculation is insufficient to establish standing under the UCL.

17 Fourth, even if Plaintiffs do have standing to assert a violation of the
 18 California UCL (and they do not), their demand for "restitution of monies" is
 19 improper and fails as a matter of law.

20 In sum, Plaintiffs have not, and cannot, plead an IHA claim; nor do they have
 21 standing to bring their UCL claim. The Court should grant Derby Wars's motion
 22 for judgment on the pleadings and enter judgment in Derby Wars's favor.

23 **II. PLAINTIFFS' ALLEGATIONS**

24 Plaintiffs allege that Horse Racing Labs is the owner and operator of the
 25 Internet website Derby Wars, an online horse racing contest business. (*See*
 26 Amended Complaint ("Am. Compl.") (Docket No. 31) ¶ 11.) Plaintiffs are horse
 27 racing associations that operate horse racing meets in California, Florida, Oregon
 28 and Maryland. (*Id.* ¶¶ 3-10.)

1 Plaintiffs allege that “Derby Wars is operating an illegal gambling website.”
 2 (*Id.* ¶ 13.) Specifically, Plaintiffs allege that in Derby Wars’s contests, “players
 3 select a horse to win in each race of the tournament, and each winning selection
 4 adds to their point total. Players can go head-to-head, or play against larger
 5 numbers of bettors” and that “[a]t the end of the tournament, the player with the
 6 most points wins a cash prize.” (*Id.* ¶ 44.) Plaintiffs allege that Derby Wars’s
 7 contests have a fixed entry fee and a fixed prize pool. (*Id.* ¶ 43.) Plaintiffs allege
 8 that Derby Wars keeps a portion of the entry fees for itself, and does not distribute
 9 its earnings to Plaintiffs. (*Id.* ¶ 44.)

10 Plaintiffs allege in a conclusory fashion that these contests are “indisputably
 11 a form of wagering on the results of horse races, which is not in compliance with
 12 federal or state laws.” (*Id.* ¶ 45.) Plaintiffs allege that Derby Wars is thus
 13 operating in violation of state gambling laws in California, Florida, Maryland and
 14 Oregon. (*Id.* ¶¶ 27-33.) Plaintiffs also allege that Derby Wars is operating its
 15 website in violation of the Illegal Gambling Business Act of 1970, 18 U.S.C. §
 16 1955. (Am. Compl. ¶ 64.)

17 Plaintiffs further allege that Derby Wars promotes itself as a way for bettors
 18 to “avoid the higher take out rates of parimutuel betting.” (*Id.* ¶ 49.) Plaintiffs
 19 allege that these lower take out rates are “significant to bettors,” citing a participant
 20 in a horse racing industry event who purportedly stated that “his total parimutuel
 21 handle has dropped about 25% because he would rather play in contests with a
 22 better return on investment.” (*Id.* ¶ 51.) Plaintiffs further allege that “Derby Wars’
 23 surveys indicate that its own customers now split their available bankrolls 80/20 in
 24 favor of parimutuel versus contest play.” (*Id.* ¶ 52.)

25 Plaintiffs therefore purport to state claims under the IHA and California’s
 26 UCL. In their IHA claim, Plaintiffs allege that “Derby Wars accepts ‘interstate off-
 27 track wagers’ that do not comply with the IHA or applicable state law on race meets
 28 at the horse tracks operated by [Plaintiffs] in California, Florida, Maryland and

1 Oregon.” (Am. Compl. ¶ 57.) Plaintiffs therefore purport to allege a cause of
 2 action under 15 U.S.C. § 3005, which provide liability for any person who accepts
 3 an “interstate off-track wager” in violation of the IHA.

4 In their UCL claim, Plaintiffs allege that Derby Wars is operating its website
 5 in violation of federal and state laws, including the IHA, California Business &
 6 Professions Code §§ 19595 and 19604 and the Illegal Gambling Business Act of
 7 1970, 18 U.S.C. § 1955. (Am. Compl. ¶ 64.) Plaintiffs allege that as a result of
 8 these violations, they are entitled to recover under the California UCL.

9 **III. LEGAL STANDARD**

10 Pursuant to “Rule 12(c) of the Federal Rules of Civil Procedure, “a party may
 11 move for judgment on the pleadings at any time after the pleadings are closed, so
 12 long as the motion is filed in sufficient time that it will not delay trial.” *Shame on*
 13 *You Prods., Inc. v. Banks*, 120 F. Supp. 3d 1123, 1143 (C.D. Cal. 2015). A Rule
 14 12(c) motion to dismiss tests the legal sufficiency of the claims and allegations
 15 asserted in the pleadings. In deciding a Rule 12(c) motion for judgment on the
 16 pleadings, the court applies the same standards applicable to Rule 12(b)(6) motions
 17 to dismiss. *Cafasso, United States ex rel. v. Gen. Dynamic C4 Sys., Inc.*, 637 F.3d
 18 1047, 1054 n.4 (9th Cir. 2011) (applying Rule 12(b)(6) standards set forth in
 19 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); *Dworkin v. Hustler Magazine Inc.*, 867
 20 F.2d 1188, 1192 (9th Cir. 1989) (“Because the [Rule 12(b) and Rule 12(c)] motions
 21 are functionally identical, the same standard of review applicable to a Rule 12(b)
 22 motion applies to its Rule 12(c) analog.”).

23 Judgment on the pleadings is proper where “taking all the allegations in the
 24 pleadings as true, the moving party is entitled to judgment as a matter of law.”
 25 *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1042 (9th Cir. 2005)
 26 (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir.
 27 2001)). In so analyzing, the court “inquires whether the complaint at issue contains
 28 ‘sufficient factual matter, accepted as true, to state a claim of relief that is plausible

1 on its face.”” *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1131 (9th Cir. 2012)
 2 (quoting *Ashcroft*, 556 U.S. at 678)); *see also Cafasso*, 637 F.3d at 1053. In
 3 deciding a Rule 12(c) motion, a court may review the face of the pleadings,
 4 documents attached to the complaint or incorporated therein, and documents subject
 5 to judicial notice. *Shame on You Prods.*, 120 F. Supp. 3d at 1144.

6 IV. ARGUMENT

7 A. The IHA Does Not Create A Private Right Of Action To Recover 8 Proceeds Of Allegedly Unlawful Gambling

9 Plaintiffs cannot recover under the IHA because that statute creates a private
 10 right of action only to recover proceeds of lawful wagering on horse races. Because
 11 Plaintiffs allege that Derby Wars is taking illegal wagers, the IHA does not apply.

12 In determining whether a statute provides a particular remedy, “the key to the
 13 inquiry is the intent of the legislature.” *New Suffolk Downs Corp. v. Rockingham*
 14 *Venture, Inc.*, 656 F. Supp. 1190, 1993 (D.N.H. 1987) (analyzing the IHA and
 15 citing cases). Courts “look[] first to the statutory language, with particular
 16 emphasis on the provisions made therein for enforcement and relief, and then
 17 reviews the legislative history and other traditional aids of statutory interpretation in
 18 seeking to determine congressional intent.” *Id.* (emphasis added) (citing *Middlesex*
 19 *Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981)). Where,
 20 as here, “a statute expressly provides a remedy, courts must be especially reluctant
 21 to provide additional remedies.” *Karahalios v. Nat'l Fed'n of Fed. Emps., Local*
 22 1263, 489 U.S. 527, 533 (1989).

23 Here, Plaintiffs do not merely allege that Derby Wars is violating the IHA.
 24 Rather, Plaintiffs repeatedly allege that Derby Wars’s fantasy contests constitute
 25 unlawful gambling in violation of the laws of California, Florida, Maryland and
 26 Oregon. (Am. Compl. ¶¶ 27-33, 57) Plaintiffs further allege that Derby Wars is
 27 operating an illegal gambling business in violation of 18 U.S.C. § 1955. (*Id.* ¶ 64.)
 28 The language and structure of the IHA, and its legislative history, all make clear

1 that the statute does not allow Plaintiffs to recover the proceeds of purported
 2 unlawful gambling activity.

3 First, the IHA explicitly states that it only allows for recovery of proceeds of
 4 lawful wagering. *See Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S.
 5 662, 668 (2008) (“[W]e start, as always, with the language of the statute.”).

6 Specifically, the IHA prohibits an “off-track betting system” from accepting
 7 “interstate off-track wagers” without consent from various parties, including the
 8 relevant horse racing association, host racing commission, and off-track racing
 9 commission. 15 U.S.C. § 3004(a)(1)-(3). The statute creates detailed exceptions to
 10 these requirements. 15 U.S.C. §§ 3004(a)(1)(B), 3004(b).

11 Most critically, the IHA establishes civil liability for “[a]ny person accepting
 12 any interstate off-track wager in violation of [the IHA].” 15 U.S.C. § 3005
 13 (emphasis added). “Interstate off-track wager” is a defined term, which means “a
 14 legal wager placed or accepted in one State with respect to the outcome of a
 15 horserace taking place in another State . . .” 15 U.S.C. §3002(3) (emphasis added).
 16 Thus, the IHA creates civil liability where a person accepts an otherwise legal
 17 interstate bet without obtaining consents of relevant parties specified in the statute.²

18 The statute thus specifically limits recovery to proceeds of lawful wagers.
 19 Further, the IHA has a section on “Congressional findings and policy” which
 20 explicitly states that the statute was passed because “there [was] a need for Federal
 21 action to ensure States will continue to cooperate with one another in the
 22 acceptance of legal interstate wagers.” 15 U.S.C. § 3001 (emphasis added). The
 23 Court should enter judgment in favor of Derby Wars on this basis alone.

24 2 For example, the IHA creates liability for a wager accepted by a “licensed
 25 parimutuel wagering operation” of one state, on the outcome of a race in another
 26 state. *See H.R. Rep. No. 94-1366*, at 5 (July 26, 1976) (noting limitation on
 27 definition of “interstate off-track parimutel wager”); *H.R. Rep. No. 95-1733*, at 1-2
 28 (Oct. 6, 1978) (noting that “interstate off-track wager” applies to “legal wagers”
 accepted “in one State with respect to the outcome of a horse-racing in another
 State” without “consent of certain parties with an interest in the applicable
 horserace” in the other state).

1 Second, the legislative history of the IHA also makes clear that it was
 2 intended to allow for recovery of proceeds of legal wagering only, leaving
 3 regulation of unlawful wagering to the States and law enforcement.

4 Specifically, upon introduction of the bill on the House floor in 1976, the bill
 5 included a definition for the term “wager” which was limited to wagers that were
 6 “otherwise permitted under State law.” 122 Cong. Rec. E1219-20, at E1219 (daily
 7 ed. Mar. 11, 1976) (emphasis added). A corresponding Section-by-Section
 8 Analysis of the bill noted that the term “wager” “does not include illegal wagers
 9 since those types of wagers are prohibited by other federal statutes.” *Id.* at E1220
 10 (emphasis added).

11 A later report on the bill by the House Committee on Interstate and Foreign
 12 Commerce again noted that the IHA would not reach illegal gambling operations,
 13 “since there are existing criminal laws which prohibit these operations.” H.R. Rep.
 14 No. 94-1366, at 5 (July 26, 1976). This committee report further noted that “the
 15 reported bill does not pertain to illegal wagering, as there are existing criminal laws
 16 governing these activities . . .” *Id.* at 9 (emphasis added).

17 A later 1977 report by the Senate Committee on Commerce, Science and
 18 Transportation stated that the definition of “interstate off-track parimutuel wager”
 19 was “limited to a wager accepted by a licensed parimutuel wagering operation” and
 20 would not apply to “illegal handbook operations which are already covered by
 21 existing criminal statutes.” S. Rep. No. 95-554, at 1 (Oct. 27 (legislative day, Oct.
 22 21), 1977).

23 Similarly, a 1978 report from the House Committee on Interstate and Foreign
 24 Commerce stated that the term “interstate off-track wager” – the term adopted in
 25 the final statute” – was defined as “a legal wager placed or accepted in one State
 26 with respect to the outcome of a horserace taking place in another State.” H.R.
 27 Rep. No. 95-1733, at 1 (Oct. 6, 1978) (emphasis added). Thus, “the regulations and
 28

1 exceptions in the bill would not apply to illegal handbook or parimutuel operations
 2 which are already covered by existing criminal statutes." *Id.* (emphasis added).³

3 Moreover, Congressional intent is particularly important here because it was
 4 animated by concerns of federalism: Congress explicitly intended to avoid the
 5 regulation of unlawful gambling, which was traditionally an area of State concern.
 6 *See* 15 U.S.C. § 3001(a)(1); *see also Sterling Suffolk Racecourse Ltd. P'ship v.*
 7 *Burrillville Racing Ass'n*, 802 F. Supp. 662, 669 (D.R.I. 1992) ("Sterling Suffolk")
 8 (noting that in passing the IHA, "the federal government was intruding into an area
 9 generally left to the states").

10 Third, in light of the "elaborate enforcement provisions" in the IHA, this
 11 Court should not read additional remedies into the statute. *See Middlesex Cnty.*
 12 *Sewerage Auth.*, 453 U.S. at 14; *see also Sterling Suffolk*, 802 F. Supp. at 667
 13 ("[T]he Court is greatly influenced by the explicit language of the IHA's
 14 enforcement and relief sections, provisions on which the Court should place
 15 particular emphasis." (emphasis added)). As result, courts have consistently
 16 rejected efforts to expand the scope of the IHA beyond its explicit provisions. *See*,
 17 *e.g.*, *Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n*, 989 F.2d
 18 1266 (1st Cir. 1993) (noting the "bold-faced evidence of congressional intent
 19 intricately interwoven into the IHA's language and structure"); *see also New Suffolk*
 20 *Downs Corp.*, 656 F. Supp. at 1193-94; *Gulfstream Park Racing Ass'n v. Tampa*
 21 *Bay Downs, Inc.*, 294 F. Supp. 2d 1291, 1303 (M.D. Fla. 2003).

22 Fourth, allowing Plaintiffs to recover proceeds for purportedly unlawful
 23 wagering would create a private right of action arising out of criminal statutes. But
 24 courts have long recognized that "[a] private right of action under a criminal statute

25
 26 ³Indeed, some members of Congress lamented the fact that the bill provided a
 27 "very generous civil remedy procedure against an offtrack betting system
 28 authorized by a State, but it offers no remedy against the illegal bookmaker." 122
 Cong. Rec. S17998-18000, at 17999 (daily ed. Oct. 1, 1976) (statement of Sen.
 Stevenson); *see also* 124 Cong. Rec. H11929-33 (daily ed. Oct. 10, 1978). The bill
 nevertheless passed with this limitation in place.

1 has rarely been implied.” *Suarez v. Beard*, Case No. 15-cv-5756, 2016 U.S. Dist.
 2 LEXIS 73555, at *11 (N.D. Cal. June 6, 2016) (citing *Chrysler Corp. v. Brown*, 441
 3 U.S. 281, 316 (1979)).

4 Notably, federal and state laws contain detailed provisions for identifying
 5 and providing restitution to victims of unlawful activity. *See, e.g.*, 18 U.S.C. §
 6 2259; Cal. Penal Code § 1202.4. If Congress intended to layer an additional means
 7 of recovery to horse racing associations on top of these mechanisms, it would have
 8 done so explicitly. *See Sterling Suffolk*, 802 F. Supp. at 669 (“Acknowledging that
 9 the federal government was intruding into an area generally left to the states,
 10 Congress intended to do so with the least interruption possible. Granting an implied
 11 private remedy would unnecessarily and inappropriately transfer partial control
 12 over betting on horseracing from the states to private third parties.”) It did the
 13 opposite: Congress explicitly stated that the IHA only provided for recovery of
 14 proceeds of “legal” wagering. Because Plaintiffs seek to recover proceeds of
 15 purportedly illegal gambling, they cannot recover under the IHA.

16 **B. The Court Should Decline To Exercise Supplemental Jurisdiction**
 17 **Over Plaintiffs’ UCL Claim**

18 A district court “may decline to exercise supplemental jurisdiction” over a
 19 related state law claim if it “has dismissed all claims over which it has original
 20 jurisdiction.” 28 U.S.C. § 1337(c)(3); *see also Sharnese v. California*, 547 Fed.
 21 App’x 820, 823 (9th Cir. 2013) (“Once all federal actions were dismissed from the
 22 action, the district court acted within its discretion in declining to hear remaining
 23 state law claims.”).

24 In deciding whether to exercise supplemental jurisdiction over state law
 25 claims after all federal claims are dismissed, courts consider the interests of
 26 “judicial economy, convenience, fairness, and comity.” *Carnegie-Mellon Univ. v.*
Cohill, 484 U.S. 343, 350 n.7 (1988). The Supreme Court has noted that state law
 27
 28

1 claims “should” be dismissed if federal claims are dismissed before trial. *United
2 Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).⁴ Thus, “in the usual case
3 in which all federal-law claims are eliminated before trial, the balance of factors to
4 be considered . . . will point toward declining to exercise jurisdiction over the
5 remaining state-law claims.” *Carnegie-Mellon Univ.*, 484 U.S. at 350 n.7; *see also*
6 *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (“Generally, dismissal of
7 federal claims before trial dictates that the pendent state claims should also be
8 dismissed.”).

9 Further, when all federal claims in a case are dismissed early in a litigation,
10 “the District Court ha[s] a powerful reason to choose not to continue to exercise
11 jurisdiction.” *Garcia v. Orion Plastics Corp.*, Case No. CV 15-07514, 2016 WL
12 2904853, at *4 (C.D. Cal. May 18, 2006) (quoting *Carnegie-Mellon Univ.*, 484
13 U.S. at 351). This is because where a matter is “still at an early stage”, “neither the
14 parties nor the Court has expended significant resources in the litigation,” and thus
15 “retaining [the matter] in federal court would not meaningfully advance the values
16 of economy, convenience, or fairness.” *Id.*

17 Here, if the Court grants Derby Wars’s motion for judgment on the pleadings
18 as to Plaintiffs’ IHA claim, it should decline to exercise supplemental jurisdiction
19 over Plaintiffs’ UCL claim, the sole remaining state law claim in this matter.⁵ This
20 litigation is in its early stages. The parties have undertaken limited briefing
21 regarding Plaintiffs’ Complaint and, now, Amended Complaint. (*See* Docket Nos.
22 23, 27-30.) The parties have not yet appeared for an initial Rule 16 conference (*see*
23 Docket No. 35), let alone commenced discovery. Thus, retaining Plaintiffs’ UCL
24 claim “in federal court would not meaningfully advance the values of economy,
25 convenience, or fairness.” *See Garcia*, 2016 WL 2904853, at *4. Thus, the Court

26 ⁴ Although *United Mine Workers* was decided before enactment of Section 1367, it
27 applies the same jurisdictional doctrines that were later codified by the statute.

28 ⁵ Plaintiffs do not allege diversity jurisdiction in their Amended Complaint. (*See*
Am. Compl. ¶ 1.)

1 should therefore decline to exercise supplemental jurisdiction over Plaintiffs'
 2 California UCL claim.

3 **C. Plaintiffs Lack Standing To Assert A Claim Under the UCL**

4 Even if the Court exercises supplemental jurisdiction, Plaintiffs lack standing
 5 to pursue their UCL claim because they have not adequately alleged that they lost
 6 money or property as a result of Derby Wars's conduct.

7 Before 2004, "any person acting for the interests of itself, its members or the
 8 general public" had standing to assert a UCL claim. *Clayworth v. Pfizer, Inc.*, 49
 9 Cal. 4th 758, 788 (2010). But in 2004, California voters approved Proposition 64,
 10 which "materially curtailed the universe of those who may enforce" the UCL.
 11 *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 321 (2011).⁶ The purpose of this
 12 change was to "eliminate standing for those who have not engaged in any business
 13 dealings with would-be defendants." *Id.* at 317.

14 Under the heightened standing requirement adopted by the California
 15 electorate, a private party must (1) establish a loss or deprivation of money or
 16 property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show
 17 that that economic injury was the result of, i.e., *caused by*, the unfair business
 18 practice." *Id.* (emphasis in original); Cal. Bus. & Prof. Code § 17204. Economic
 19 injury may be shown where, among other things, plaintiffs: (i) surrender more or
 20 acquire less in a transaction than they otherwise would have; (ii) "have a present or
 21 future property interest diminished;" (iii) are "deprived of money or property to
 22 which [they have] cognizable claim;" or (iv) are "required to enter into a
 23 transaction, costing money or property, that would otherwise have been
 24 unnecessary." *Kwikset*, 51 Cal. 4th at 323.

25

26 ⁶ Though not a requirement to establish standing, the purpose of Proposition 64 was
 27 "to curtail the prior practice of filing suits on behalf of clients who have not used
 28 the defendant's product or service, viewed the defendant's advertising, or had any
 other business dealing with the defendant." *Clayworth*, 49 Cal. 4th at 788 (internal
 quotations omitted) (emphasis added).

1 Plaintiffs do not allege any actual economic injury. Rather, Plaintiffs allege
 2 that they have been deprived of the “take out” rate on wagers that Plaintiffs
 3 speculate customers might have made had at Plaintiffs’ tracks if they had not been
 4 participating in Derby Wars’s online fantasy contests. (Am. Compl. ¶ 50.) In
 5 support of this allegation, Plaintiffs allege that Derby Wars has diverted customers
 6 from Plaintiffs’ tracks because Derby Wars’s customers – not Plaintiffs’ customers
 7 – split their bankrolls between “parimutuel versus contest play.” (*Id.* ¶ 52.)
 8 Plaintiffs also purport to quote one person, Brett Wiener, who purportedly “now
 9 splits his bankroll between Derby Wars and legal parimutuel betting.” (*Id.* ¶ 51.)
 10 These allegations are insufficient to meet the UCL’s standing requirements.

11 First, Plaintiffs allege that Derby Wars has deprived them of fees and
 12 compensation to which they are entitled under the IHA (*Id.* ¶¶ 18, 58-59.) But as
 13 discussed above, Plaintiffs are not entitled to recover under the IHA. (*See* Section
 14 IV(A), *supra*.)

15 Second, while Plaintiffs claim that Derby Wars has diverted customers away
 16 from Plaintiffs’ tracks, such “conclusory allegations without more are insufficient
 17 to defeat a motion for judgment on the pleadings” *See Spy Optic, Inc. v.*
 18 *Alibaba.Com, Inc.*, Case No. CV 15-00659, 2015 WL 7303763, at *4 (C.D. Cal.
 19 Sept. 28, 2015) (internal quotations omitted)). Plaintiffs’ claim that Derby Wars’s
 20 customers “split their available bankrolls 80/20 in favor of parimutuel versus
 21 contest play” is inapposite. (Am. Compl. ¶ 52) Tellingly, Plaintiffs make no
 22 allegation whatsoever about how their own customers split their bankrolls, if at all.
 23 Nor do they allege whether they have actually lost customers as a result of Derby
 24 Wars’s conduct.

25 As the Court correctly identified in ruling on Derby Wars’s motion to dismiss
 26 Plaintiffs’ RICO claim, Plaintiffs do not “show that [Derby Wars’s] actions in
 27 operating a fantasy . . . website deprive Plaintiffs of customers that would otherwise
 28 place bets at race tracks.” (Order at 7.) The Court continued:

1 Plaintiffs essentially assume, without adequate support,
 2 that customers who place bets on Derby Wars, or
 3 participate in fantasy sports betting in general, are the
 4 same customers who, but for the existence of fantasy
 5 sports betting websites, would have otherwise engaged in
 6 legal parimutuel gambling. This is not necessarily true.
 7

8 *(Id. at 6.)⁷*
 9

10 In other words, the mere allegation that Derby Wars's customers may split
 11 their bankrolls is insufficient to establish that Plaintiffs have lost money to which
 12 they are entitled. Derby Wars's customers may not otherwise engage in wagering
 13 on horses. Or they may wager at tracks operated by parties other than Plaintiffs.
 14 As the Court previously noted:

15 In amending their Complaint, Plaintiffs must allege facts
 16 that show that at least some of those who play fantasy
 17 horse race betting online are those that would otherwise
 18 place bets at the race tracks. Without more information
 19 in the Complaint, it is even possible that fantasy sports
 20 betting expands the horse racing betting consumer base,
 21 by promoting interest in the sport. This, in turn, would
 22 benefit Plaintiffs.

23 *(Id.)*
 24

25 Plaintiffs attempt to skirt this issue by alleging that one individual, Brett
 26 Wiener, "now splits his bankroll between Derby Wars and legal parimutuel
 27 betting." (Am. Compl. ¶ 51.) But in the article Plaintiffs cite (*see id.* ¶ 51 n.3),⁸

28 ⁷ Though the Court undertook this analysis within the framework of deciding Derby
 29 Wars's motion to dismiss Plaintiffs' RICO claim, the same reasoning applies here.
 30 Just as the Court found that Plaintiffs' RICO allegations of economic injury were
 31 too speculative, so too should the Court hold here. *See Diaz v. Gates*, 420 F.3d
 32 897, 898 (9th Cir. 2005) ("RICO does not provide a cause of action for all types of
 33 injury to property interests, but only for injuries resulting in 'concrete financial
 34 loss.'").

35 ⁸ Plaintiffs cited www.bloodhorse.com/horse-racing/articles/197528/innovation-in-racing-not-without-obstacles in support of Paragraph 51 of the FAC. That is an
 36 improper link. Derby Wars believes Plaintiffs inverted numbers in the website
 37 address, and intended to cite www.bloodhorse.com/horse-racing/articles/197258/innovation-in-racing-not-without-obstacles.

1 Wiener is not quoted as making any mention of Derby Wars or Plaintiffs, nor does
 2 the article state whether he resides in a state where one of Plaintiffs' tracks is
 3 located. Moreover, Wiener states that online gaming may prove a more convenient
 4 forum than physically going to race tracks because customers may "live a great
 5 distance from racetracks and off-track betting parlors."⁹ The Court envisioned this
 6 very scenario when it contemplated that there may be "other reasons why customers
 7 may place wagers somewhere other than at a race track." (Order at 6 ("Customers
 8 might not want to be physically present at a race track when they make these
 9 wagers, preferring the ease of using an online alternative.").) Plaintiffs' allegations
 10 that they were deprived of customers are contradicted by the very evidence they
 11 incorporate into the Amended Complaint.

12 In short, just as the Court found with respect to the original Complaint,
 13 Plaintiffs do not allege an actual economic injury. Plaintiffs are not entitled to
 14 "fees" under the IHA, for reasons discussed above. In addition, Plaintiffs do not
 15 allege that they lost any actual customers as a result of Derby Wars's conduct. *See*
 16 *Kwikset*, 51 Cal. 4th at 321 Plaintiffs merely speculate that participants in Derby
 17 Wars's fantasy contests would otherwise be wagering at their tracks. Such
 18 conjecture is wholly insufficient to establish standing under the UCL.

19 **D. Even If Plaintiffs Have Standing To Assert A UCL Claim, Their**
 20 **Demand For Restitution Of Monies Is Improper As A Matter Of**
 21 **Law**

22 Assuming Plaintiffs have standing to assert a UCL claim against Derby
 23 Wars, their request for "restitution of monies wrongfully obtained and retained by
 24 Derby Wars" should be dismissed. *See Johnson v. Microsoft Corp.*, Case No. C06-
 25 0900RSM, 2007 WL 2404844, at *1 (W.D. Wash. Aug. 17, 2007) ("[C]ourts in the
 26

27 ⁹ *See Innovation in Racing Not Without Obstacles*, Blood-Horse,
 28 <http://www.bloodhorse.com/horse-racing/articles/197258/innovation-in-racing-not-without-obstacles> (last visited June 29, 2016).

1 Ninth Circuit have reviewed and dismissed claims for various damage awards, such
 2 as liquidated damages claims, on Rule 12(c) motions.” (collecting cases)).

3 The UCL does not provide for nonrestitutionary disgorgement. *Korea*
 4 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144, 1148 (2003). Thus,
 5 to prove entitlement to restitution, a plaintiff must show that the defendant received
 6 and unjustly retained a benefit at the plaintiff’s expense. *Lectrodryer v. SeoulBank*,
 7 77 Cal. App. 4th 723, 726 (2000). That is, the plaintiff must seek to “return money
 8 obtained through an unfair business practice to those persons in interest from whom
 9 the property was taken, that is, to persons who had an ownership interest in the
 10 property or those claiming through that person.” *Korea Supply Co.*, 29 Cal. 4th at
 11 1144-45 (emphasis added). Thus, Plaintiffs “must demonstrate that [Derby Wars]
 12 is in possession of money or property taken from [Plaintiffs].” *Asghari v.*
 13 *Volkswagen Grp. of Am., Inc.*, 42 F. Supp. 3d 1306, 1324 (C.D. Cal. 2013).

14 Here, Plaintiffs fail to allege a single fact establishing that Derby Wars is in
 15 possession of money taken from Plaintiffs. To the extent Plaintiffs’ request for
 16 “fees” is a veiled attempt at obtaining Derby Wars’s profits (or a portion thereof),
 17 they allege no current ownership right therein. To the contrary, Plaintiffs allege
 18 that Derby Wars’s customers might have otherwise bet at their tracks. This is
 19 precisely the type of nonrestitutionary disgorgement of profits rejected by
 20 California courts. *See Korea Supply Co.*, 29 Cal. 4th at 1145. Accordingly,
 21 Plaintiffs’ demand for “restitution of monies” fails and should be dismissed.

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1 **V. CONCLUSION**

2 For all of the foregoing reasons, Derby Wars respectfully requests that the
3 Court grant its motion in its entirety and enter judgment in its favor.

4

5 Dated: June 29, 2016

Respectfully submitted,

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